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IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE YEMENI NATIONAL ORGANIZATION FOR DEFENDING RIGHTS AND FREEDOMS, IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is the Yemeni National Organization for Defending Rights and Freedoms ("HOOD"), a nongovernmental, nonprofit organization that is dedicated to promoting human rights of Yemenis both in Yemen and abroad. It was formed in 1998 by a group of attorneys and human-rights activists, and is the first group to monitor human rights compliance in Yemen. The organization promotes basic freedoms at the local level; ensures that domestic legal systems incorporate international human rights protections; helps build a strong international system of justice for the worst human rights crimes; and promotes effective responses to security threats in keeping with the rule of law.

With the advent of the "war on terror," HOOD became involved in protecting the rights of more than 100 Yemeni citizens held at the United States Naval Base at Guantanamo Bay, and sponsored international conferences, in association with Amnesty International and other international human rights groups, to focus attention on the Guantanamo detainees' treatment by the United States. In particular, the organization believes that Petitioner's continued detention and trial by a military commission present pivotal questions about the rule of law in the United States. Resolution of these questions will have a profound impact not only on Petitioner's life and the lives of other detainees and their families, but also on HOOD's continuing efforts to promote human rights and the rule of law in Yemen as well as elsewhere in the Middle East. HOOD believes that, because of the United States' position as the world's leading democracy and the role the United States has assumed as the

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[1] The parties have consented to the filing of this brief. Their letters are on file or will be filed with the Clerk of this Court. Pursuant to Rule 37.6, *amicus curiae* discloses that the law firm of Jones Day authored the brief in part and made a contribution in kind to its printing, preparation, and submission.

model for democracy and reform throughout the Middle East, Petitioner's treatment by the United States today presents a grave threat to HOOD's mission in Yemen and to the efforts of similar organizations throughout the Middle East. It also threatens to reverse the progress made in Yemen and elsewhere toward democracy, protection of human rights, and the rule of law.

SUMMARY OF ARGUMENT

With the leadership and guidance of the United States, the Middle East has made substantial progress in recent years in developing democratic institutions, respecting human rights, and adhering to the rule of law. However, the Executive Branch's treatment of Petitioner and other detainees in Guantanamo and elsewhere threatens to slow and, indeed, reverse that progress. Because much of the Middle East, along with much of the world, perceives the United States to be acting contrary to its own law and to the democratic ideals it espouses, the global influence that the United States has long enjoyed on issues of democracy and human rights is being severely undermined.

Following the attacks of September 11, 2001, the Arab world responded to the United States' heightened efforts to close the "freedom deficit" that existed in the region. Arab nations paid heed to the United States' example and to its exhortations on a broad range of issues, such as respect for due process of law, that are presented in this case. At the urging of the United States and with its direct assistance, Yemen and many other Arab nations have made strides in holding free elections, implementing judicial reforms, and advancing human rights. This progress has confirmed the essential role of the United States' leadership in the achievement of advances in these areas.

While promoting these ideals in the Middle East, however, the Executive Branch appears plainly to violate United States and international law in the treatment of Petitioner and similarly situated detainees. As fully

discussed in Petitioner's brief and the briefs of other *amici*, the Executive Branch has (1) established military commissions to try detainees it designates as "enemy combatants" without any determination by a competent tribunal that a detainee is an "enemy combatant"; (2) used these military commissions even where, as here, a detainee's status as an enemy combatant is in doubt, the detainee is held on territory within the sovereign control of the United States and subject to its civilian courts, and there has been no showing of exigencies requiring the use of an irregular tribunal; and (3) refused to acknowledge the applicability of the 1949 Geneva Conventions to Petitioner and similarly situated detainees, or to provide the critical procedural protections that these binding treaties guarantee to individuals captured in an area of conflict and accused of war crimes.

Because of the perception that the United States has violated fundamental principles of United States and international law by its treatment of Petitioner and other detainees captured in the "war on terror," that treatment undermines the United States' influence on democracy, human rights, and the rule of law in the Middle East. The violations of United States and international law implicated by the United States' treatment of the detainees resemble violations of human rights and the rule of law in the Middle East that have long been criticized by international human rights organizations, by those in the Middle East who are committed to human rights and democracy, and by the United States itself. The United States' actions in this regard not only have severely undermined the United States' influence in the Middle East in promoting human rights and the rule of law, but have also provided an unfortunate example that has been used, and might be used in the future, in attempts to justify human rights abuses in the Middle East.

ARGUMENT

I. SUSTAINED LEADERSHIP BY THE UNITED STATES IS ESSENTIAL TO THE ADVANCEMENT OF DEMOCRACY, HUMAN RIGHTS, AND THE RULE OF LAW IN THE MIDDLE EAST

On issues of democracy, human rights, and the rule of law, the United States sets the example for the rest of the world. Especially since the September 11, 2001 attacks, the United States has challenged the Middle East to follow in its footsteps—to embrace the development of democratic institutions, to respect human rights, and to adhere to the rule of law. The Arab world has responded, and progress has been made throughout much of the Middle East. But progress is difficult, especially in the post-9/11 environment. For the Middle East to continue pursuing these ideals, it is critical that the United States continue to lead the way.

The September 11 attacks worked a fundamental shift in United States policy in the Middle East. Secretary of State Condoleezza Rice has acknowledged this change of direction: "For sixty years, . . . the United States[] pursued stability at the expense of democracy . . . in the Middle East, and . . . achieved neither. Now we are taking a different course. We are supporting the democratic aspirations of all people." Steven R. Weisman, *Rice Urges Egyptians and Saudis to Democratize*, N.Y. TIMES, June 21, 2005, at A1; *see also* Council on Foreign Relations, *In Support of Arab Democracy: Why and How*, Report of an Independent Task Force at 3-4 (2005), *available at* http://www.cfr.org/content/publications/attachments/Arab_Democracy_TF.pdf (last visited Jan. 5, 2006).

In a seminal speech in November 2003, President George W. Bush described the United States' "new policy" as "a forward strategy of freedom in the Middle East." Remarks by the President at the 20th Anniversary of the National Endowment for Democracy, Nov. 6, 2003, *available at* http://www.caci.com/homeland_security/pres_address/pres_

address_11-6-03.shtml (last visited Jan. 5, 2006). This strategy, the President emphasized, addresses the fundamental "freedom deficit" that exists in the region:

> [T]here's a great challenge today in the Middle East. In the words of a recent report by Arab scholars, the global wave of democracy has—and I quote—"barely reached the Arab states." They continue: "This freedom deficit undermines human development and is one of the most painful manifestations of lagging political development." The freedom deficit they describe has terrible consequences, [for] the people of the Middle East and for the world.

Id. To avert these consequences, the President called upon Middle East nations to embrace the ideals of free societies:

> Successful societies limit the power of the state and the power of the military—so that governments respond to the will of the people, and not the will of an elite. Successful societies protect freedom with the consistent and impartial rule of law, instead of . . . selectively applying the law to punish political opponents. Successful societies allow room for healthy civic institutions—for political parties and labor unions and independent newspapers and broadcast media.

Id. As the world's oldest, strongest, and most important democracy, the United States sets a key guidepost for other nations when it clearly enunciates and applies the principles upon which free societies necessarily are based.

Arab nations pay heed to the United States' example and efforts. "[T]he Arab world holds in high esteem . . . the ambitious American dream of attaining a more just, peaceful and tolerant human society." The League of Arab States Statement on the Occasion of the 1st Anniversary of the Tragic Events of 11/9/2001 (Sept. 11, 2002), *available at* http://www.arableagueonline.org/arableague/english/details_en.jsp?art_id=1298&level_id=219 (last visited Jan. 5, 2006). King Abdullah of Jordan, for example, has acknowledged

that "the leadership of the United States is crucial in all our efforts to reach a just and lasting peace of the Middle East." *President Bush, Jordanian King Discuss Iraq, Middle East* (May 6, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/05/2004 0506-9.html (last visited Jan. 5, 2006). This recognition and admiration are derived from the United States' moral and political legitimacy.

Moreover, the United States has backed up its words with concrete efforts that "vividly demonstrate[] U.S. commitment to promoting democracy and respect for human rights." U.S. Dep't of State, *Supporting Democracy and Human Rights: The U.S. Record 2004-2005*, at 176 (Mar. 28, 2005), *available at* http://www.state.gov/g/drl/rls/shrd/2004/ (last visited Jan. 5, 2006). The United States has "[p]romoted good governance and encouraged broad political participation," "pressed government representatives to take proactive approaches to democratization," and "promot[ed] freedom of expression and press liberties." *Id.* In Yemen, for example, the United States has engaged the government directly, "urg[ing] the Government to enact social reforms, encourage respect for human rights and foster democratic development at the highest levels." *Id.* at 211. The United States also has worked with the Yemeni military and "addressed awareness of international norms of human rights and fostered greater respect for the principle of civilian control of the military and the rule of law." *Id.*

Most significantly, the United States has exhorted Middle East nations on many of the same types of issues as those presented in this case:

> The United States supported rule of law and judicial reform efforts across the region, emphasizing greater independence and transparency and supporting development of judicial codes of conduct. Ensuring respect for due process and improving pretrial and trial procedures remained U.S. priorities. Torture, arbitrary arrest, prolonged incommunicado detention, excessive use

> of force and reliance on restrictive emergency laws remained problems in many countries. The United States supported improved training for security forces with specific human rights components, as well as greater accountability and drafting of new penal codes.

Id. at 177.

Arab nations have responded with notable progress on democracy and human rights. On January 6, 2005, U.S. Representative Ileana Ros-Lehtinen, together with 25 co-sponsors, introduced a resolution in the U.S. House of Representatives commending several Arab nations, including Jordan, Morocco, Bahrain, Kuwait, Qatar, Oman, and Yemen, for their efforts at political and economic liberalization, and expressing the hope that these efforts will serve as a model for other nations in the Middle East. H.R. Res. 37, 109th Cong. (Jan. 6, 2005). The Resolution cited numerous indicia of progress, including the holding of parliamentary elections and the establishment of a National Center for Human Rights in Jordan, efforts to promote women's rights in Morocco, the legalization of political parties in Bahrain, greater political accountability in Kuwait, the adoption of a new constitution in Qatar, and the extension of voting rights to all citizens over 21 years of age in Oman. *Id.* at 2-9. Saudi Arabia also has exhibited signs of change with its recent holding of municipal elections. *See* The Economist Intelligence Unit, *Special Report: The Dynamics of Democracy in the Middle East* at 38 (2005), *available at* http://graphics.eiu.com/ files/ad_pdfs/ MidEast_special.pdf (last visited Jan. 5, 2006).

Moreover, the House Resolution included several specific examples of progress in democracy and human rights in Yemen. The Resolution quoted Yemen's President, Ali Abdullah Saleh, who stated: "Democracy is the choice of the modern age for all peoples of the world . . . . It is the way to achieve security, stability, development and better future for our countries . . . . Human rights are tightly

connected to democracy and the state of law and order." *See* H.R. Res. 37, at 8. The Resolution also cited Yemen's holding of "free and fair" elections for its House of Representatives, the aggressive recruitment of women in the public sphere, the introduction of judicial reform, and the improvement in the quality of education for all Yemeni citizens. *Id.* at 8-9; *see also, e.g.*, *US Envoy Hails Yemen's Democracy, Efforts to Fight Terrorism*, BBC Monitoring Middle East, May 18, 2005 (quoting U.S. Ambassador to Yemen Thomas Charles Krajeski's statement that "Yemen has been an advocate of democratic reform in the region, holding competitive elections and encouraging open debate in the press").

These are but a few examples of pronounced liberalization efforts in Yemen. In 2003, Yemen launched a three-year program sponsored by the United Nations Development Programme aimed at strengthening the ability of the government and civil society organizations to promote and protect human rights. *See Yemen Moves to Put Human Rights Standards Into Practice*, Al-Bawaba News, Apr. 23, 2003. A number of Yemeni organizations—including the Institute for the Advancement of the Democratic-Civic Trend, which implements projects intended to improve the electoral process, the Center for Information and Training on Human Rights, the Yemeni Institute for Advancement of Democracy, and the Yemeni National Organization for Defending Rights and Freedoms (HOOD)—work in concert with the Ministry of Human Rights and regional and international institutions. *See* Republic of Yemen, Ministry of Human Rights, *National Human Rights Report 2004*, at 39-40, *available at* http://www.mhryemen.org/reports/local_rep_en.php (last visited Jan. 5, 2006) [hereinafter "*Yemen Human Rights Report*"]. The mission of these organizations and institutions is to develop—through education and heightened accountability—the foundation for increased democracy and human rights in Yemen.

The progress in Yemen and elsewhere in the Middle East fulfills the first President Bush's vision that "America stands at the center of a widening circle of freedom—today, tomorrow and into the next century." George H.W. Bush, President, State of the Union Address (Jan. 31, 1990), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=18095 (last visited Jan. 5, 2006). As that "widening circle" illustrates, moreover,

> Freedom, democracy and human rights all go hand in hand. . . . The promotion of democracy and freedom is a cornerstone of the foreign policy of the administration. And we can already see the results . . . .

Human Rights "Extremely Important" To U.S.; Says Delegate to UNCHR, July 21, 2005 (statement of Goli Ameri, U.S. delegate to United Nations Commission on Human Rights), *available at* http://usinfo.state.gov/eur/Archive/ 2005/Jul/21-564409.html (last visited Jan. 5, 2006).

But "the experiment of human rights is still new in [Yemen]," and the difficult task still remains "to pay great and special attention to the principles of human rights, to consolidate them and surround them with the respect they deserve, to make them an ideal road to the flourishing of the democratic experiment . . . ." *Yemen Human Rights Report* at 8. As Yemen and other Middle East nations tackle that difficult task, it is essential to recall that "America[,] not just the nation[,] but an idea, [is] alive in the minds of people everywhere." George H.W. Bush, President, State of the Union Address. To foster continued progress on democracy, human rights, and the rule of law in the Middle East, the United States must continue to nurture and promote this "idea" that it has long represented throughout the world.

II. THE EXECUTIVE BRANCH'S TREATMENT OF PETITIONER AND SIMILARLY SITUATED DETAINEES APPEARS CONTRARY TO UNITED STATES LAW AND TO THE DEMOCRATIC IDEALS THAT THE UNITED STATES GOVERNMENT SEEKS TO EXPORT TO THE MIDDLE EAST

The United States risks the progress made thus far toward democracy in the Middle East by appearing to the rest of the world as violating its own laws and fundamental principles. While the full extent of the apparent violations of United States and international law implicated by this case are extensively addressed in Petitioner's brief and those of other *amici*, some of the most fundamental of these violations are plainly apparent to the international community.

First, the United States appears to have denied Petitioner and other detainees fundamental due process of law by designating and detaining them as "enemy combatants" without any judicial or other review by a competent tribunal of the threshold "enemy combatant" classification. Resident enemy aliens detained by the Executive are entitled to judicial review of a determination of "the existence of a state of war" and their status as "enemy alien[s]." *Johnson v. Eisentrager*, 339 U.S. 763, 775 (1950); *see also id.* at 784 (noting that alleged resident alien enemies are "entitled" to a "judicial hearing" to determine "that they are really alien enemies"). Moreover, this Court has recently reaffirmed this right to judicial review for alleged "enemy combatants" in the "war on terror" detained either on U.S. soil or where the United States has "sovereig[n] control," such as the Guantanamo Bay Naval Base. *See Rasul v. Bush*, 542 U.S. 466, 483 (2004). But Petitioner and the detainees have not been afforded such review or, indeed, any meaningful review of the Executive's determination of their "enemy combatant" status. Notwithstanding Petitioner's consistent assertion of his innocence, he has been detained for the past four years at Guantanamo Bay as an "enemy combatant" based on the

President's decree that he "was a member of al Qaeda or was otherwise involved in terrorism directed against the United States." Pet. App. 1a-2a. Petitioner has not been afforded any judicial review of that determination.[2]

Second, the detainees are being forced to defend themselves before military commissions whose authority derives from the common law of war, notwithstanding that the detainees deny they are enemy combatants, that the Executive Branch denies they are subject to the laws of war, and that there exists no exigency to justify the President's extraordinary resort to such an extrajudicial tribunal.

Military commissions as a component of the U.S. administration of justice have been used only to try offenses "which in war would go unpunished in the absence of a provisional forum for the trial of the offenders." *See Madsen v. Kinsella*, 343 U.S. 341, 348 (1952). Thus, the use of commissions historically has been limited to circumstances where the defendants were admitted enemy combatants or the U.S. courts were not available. *See In re Yamashita*, 327 U.S. 1 (1946) (trial of undisputed combatant for Japan in occupied Philippines following surrender of Japanese forces on island); *Ex parte Quirin*, 317 U.S. 1, 21-23, 45-46 (1949) (trial of prisoners who admittedly were members of German military that had covertly entered United States to perform acts of war); *Madsen*, 343 U.S. at 345 (trial of civilian in occupied Germany for murder that took place on a U.S. military base and in violation of German law where defendant conceded that no "non-military court of the United States or Germany had jurisdiction to try her"). But

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[2] The only review of that determination has been provided by the Combat Status Review Tribunal ("CSRT"). However, the CSRT's review plainly failed to comport with due process. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 472 (D.D.C. 2005) (holding that the CSRTs violate "due process" because they improperly rely on classified information, deny detainees review of that information, and prohibit detainees the assistance of counsel).

Petitioner's enemy combatant status is in dispute and was never properly determined, and, as this Court held in *Rasul*, Guantanamo Bay is within the sovereign control of the United States and subject to its civilian courts. As such, there is no basis to justify a military commission's reach over Petitioner.[3]

Third, the detainees have been denied the basic protections of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War ("GPW") because the military commissions convened to try them lack the fundamental due process protections assured to prisoners of war under the GPW. The GPW is a critical international treaty made after World War II to protect individuals involved in armed conflict.[4] It requires that a prisoner of war be tried only "by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples," and "offer[ing] the essential guarantees of independence and impartiality as generally recognized." GPW arts. 3, 84, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S.

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[3] Furthermore, the United States Government itself appears to have contravened the primary possible basis for the use of such military commissions. The underlying authority for military commissions is provided and limited by "the common law of war" as established under international law. *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 249 (1863); *see Dooley v. United States*, 182 U.S. 222, 231 (1901). Although the GPW clearly is central in the common law of war, *see, e.g.*, 18 U.S.C. § 2441 (defining war crimes by reference to, *inter alia*, Common Article 3 of the Geneva Conventions), the United States has insisted that the "war on terror" is *not* a conflict covered by the Convention. Therefore, by the U.S. Government's own arguments, the common law of war does *not* cover the "war on terror" as applicable to Petitioner, and thus does *not* support a military commission's authority to try him.

[4] *See* Int'l Comm. of the Red Cross, *Commentaries on Geneva Conventions of 12 August 1949, Convention (III) Relative to the Treatment of Prisoners of War*, Article 2, *available at* http://www.icrc.org/ihl.nsf/COM/375-590005?OpenDocument (last visited Jan. 5, 2006).

135. It also prescribes the minimum procedural protections that must be given to any POW on trial. *See id.*, art. 99-108.

The President's military commissions are not such tribunals. These military commissions lack basic procedural safeguards including (1) an unrestricted right of the defendant to be present during the trial and to confront his accusers, (2) basic evidentiary rules such as those excluding unduly prejudicial evidence, (3) rules excluding improperly obtained evidence, such as testimony obtained through torture or other unlawful coercion, and (4) rules excluding testimony that a witness refuses to provide under oath or affirmation.[5] In addition, the President has unreviewable discretion to change the commissions' rules, to replace the members of panels established to review the commissions' determinations, and to accept or reject those panels' decisions. *See* MCO No. 1, ¶¶ 4A(3), 6H(6).

For these reasons, it is apparent that the treatment of Petitioner and similarly situated detainees violates due process under U.S. law and the United States' international obligations. The U.S. Government's attempts to use military commissions to try Petitioner and other detainees in apparent violation of U.S. and international law do not inspire confidence in the rest of the world that the U.S. Government takes seriously its commitment to human rights and principles of due process of law.

III. THE UNITED STATES' INFLUENCE ON DEMOCRACY, HUMAN RIGHTS, AND THE RULE OF LAW IN THE MIDDLE EAST HAS BEEN UNDERMINED

The progress of democracy and human rights in the Arab world inevitably is impeded when, as now, the United States

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[5] *See* Dep't of Defense, Military Commission Order No. 1 (Revised) (Aug. 31, 2005) ["MCO No. 1"], ¶¶ 4A(3), 6D(1), 6D(2)(b), 6D(5)(b), 6H(6); *compare* Uniform Code of Military Justice art. 31(d), 10 U.S.C. § 831 (d) (2000).

itself is perceived to be violating these principles. The fundamental nature of the United States' breaches of the rule of law has been recognized by, and has resulted in heavy criticism from, the international community. *See, e.g.*, *International Concern Over US Detainees at Guantanamo Bay*, DOW JONES ASIAN EQUITIES REPORT, Jan. 24, 2002 (noting criticism by nations including Britain, Germany and Malaysia); Amnesty International, *Guantanamo and Beyond: The Continuing Pursuit of Unchecked Executive Power*, at 8 (May 13, 2005) (criticizing United States for "disregard[ing] basic human rights principles and international legal obligations" and committing "[s]erious human rights violations"); *see also* Press Conference with Kofi Annan and Foreign Minister Kamal Kharrazi (Jan. 26, 2002), *available at* http://www.un.org/ News/dh/ latest/ afghan /sg-teheran26. htm (last visited Jan. 5, 2006) (statements of Iranian Foreign Minister urging respect for human rights in the treatment of Guantanamo detainees).

At the very least, the treatment of Petitioner and similarly situated detainees erodes the moral high ground that the United States has occupied for many years in its criticism of foreign nations' use of military tribunals and secret courts. In the 2000 edition of its annual human rights report, for example, the State Department censured several countries for using military tribunals. *See* U.S. Dep't of State, *Egypt: Country Reports on Human Rights Practices 2000*, *available at* http://www.state.gov/g/drl/rls/hrrpt/2000/nea/784.htm (last visited Jan. 5, 2006). In particular, the State Department criticized Egypt's use of military courts to try defendants accused of terrorism. *Id.* The report stated that Egypt's military courts have "deprived hundreds of civilian defendants of their constitutional right to be tried by a civilian judge." *Id.* It went on to criticize the military courts' lack of independence, noting that civilian defendants are not ensured due process before an independent tribunal since military judges are appointed by the Minister of Defense and subject to military discipline. *Id.*

Remarkably, the State Department's most recent human rights report contained criticisms of other nations nearly identical to those made of the detentions at Guantanamo Bay. The State Department report on Algeria, for example, noted that "[p]rolonged pre-trial detention remained a problem" in that country. U.S. Dep't of State, *Country Reports on Human Rights Practices – 2004* (Feb. 28, 2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41721.htm (last visited Jan. 5, 2006). With respect to Iran, the State Department voiced concerns that "[i]n practice, there is no legal time limit for incommunicado detention *nor any judicial means to determine the legality of detention.* In the period immediately following detention or arrest, many detainees were held incommunicado and denied access to lawyers and family members." *Id.* (emphasis added). Furthermore, as with allegations of torture at Guantanamo, the State Department noted that allegations of torture by Libyan authorities "were difficult to corroborate because many prisoners were held incommunicado." *Id.* Indeed, the procedures for the military commissions to be used for the Guantanamo detainees might appear to resemble the apparatus of the "Revolutionary Courts" employed for "national security" cases in Iran, as described by the State Department:

> Trials in the Revolutionary Courts, in which crimes against national security and other principal offenses are heard, were notorious for their disregard of international standards of fairness. Revolutionary Court judges were chosen in part based on their ideological commitment to the system. Pretrial detention often was prolonged, and defendants lacked access to attorneys. Indictments often lacked clarity and included undefined offenses such as 'anti-revolutionary behavior,' 'moral corruption,' and 'siding with global arrogance.' Defendants did not have the right to confront their accusers.

Id.

In the Middle East, moreover, individuals readily associate such practices with wider abuses that, recent progress notwithstanding, persist across much of the region. For example:

- In Iran, so-called "parallel institutions" ("*nahad-e movazi*") are quasi-official organs that are used to crush student protests and to detain activists, writers, and journalists in secret prisons. Human Rights Watch, *World Report 2005*, Middle East and North Africa 461 (2005), *available at* http://hrw.org/wr2k5/ (last visited Jan. 5, 2006) ("Human Rights Watch 2005 Report"). These secret prisons fall beyond the oversight of the National Prisons Office, but they serve the Iranian government's agenda through routine abuse, intimidation, and torture of political prisoners. *Id.* at 462.
- In Saudi Arabia, many basic rights lack any legal protection, political parties are prohibited, and freedom of expression is limited. *Id.* at 480. The often draconian punishments imposed by Saudi authorities include flogging for protesting against the government, which violates Saudi Arabia's obligations as a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *See* Hassan M. Fattah, *Saudi Court Orders Lashings for 15 Demonstrators*, N.Y. TIMES, Jan. 13, 2005, at A6.
- In Syria, emergency rule first imposed in 1963 remains in effect, and the government routinely arrests demonstrators protesting against the emergency law. *See Rights Advocates to be Jailed in Syria*, N.Y. TIMES, Apr. 4, 2004, § 1, at 3.
- In Tunisia, the judiciary often ignores procedural irregularities, convicting defendants on the basis of confessions secured under duress. *See* Human Rights Watch 2005 Report at 494. Long-term solitary confinement is a common practice in Tunisian prisons,

and the government has not allowed independent observers to inspect prisons since 1991. *Id.*

Undoubtedly, much work remains to be done in advancing the progress of democracy and human rights in the Middle East. Yet Arab nations have indicated that the United States' criticisms ring hollow when they appear inconsistent with the United States' actions toward its own detainees. Yemen's Prime Minister, Abdel Kader Bajammal, has remarked that the United States is speaking with "two voices. One is speaking about human rights and the other about the war against terrorism under any circumstances." *Under Fire on Human Rights, Yemen Hits Back at US Double Standards*, AGENCE FRANCE PRESSE, Mar. 16, 2005. Mr. Bajammal added, "I am asking them: under [what] international or local law . . . are people still in Guantanamo?" *Id.* Iran's premier, Ali Khamenei, has openly accused the United States of hypocrisy: "They rant about human rights while setting up scores of torture centers—such as the ones at Guantanamo and Abu Ghraib—or maintain a conniving silence about such incredible outrages." *Khamenei Message to Hajj Pilgrims: The Zionist Octopus and U.S. Imperialism Harbor Plans for the Entire Islamic World*, The Middle East Media Research Institute, Special Dispatch No. 854 (Jan. 27, 2005) (translation of speech by Ali Khemenei on Iranian television), *available at* http://memri.org/bin/articles.cgi?Page=countries&Area=iran &ID=SP85405 (last visited Jan. 5, 2006). Similarly, when the United States criticized Iran's continued detention of journalist Akbar Ganji, Iran immediately challenged U.S. credibility: "The White House talks about the violations of human rights in Iran while the world is disgusted by the breaches of human rights carried out by U.S. forces in Guantanamo and Abu Ghraib prisons . . . ." Aljazeera.com, *Iran: U.S. in No Position to Criticize Others' Human Rights*, *available at* http://www.aljazeera.com/me.asp? service_ ID=9177 (last visited Jan. 5, 2006) (statement of Iran Foreign Ministry spokesman Hamid Reza Asefi).

The Arab press similarly has observed:

> [C]oncerns about the U.S.'s treatment of the detainees it arrests in its "war on terrorism" . . . undermine[s] Washington's credibility when it tries to criticize other nations' human rights record. It is frustrating to see that the United States, which has consistently declared its commitment to the principles of independence and democracy, doesn't follow these terms when it is involved.

Aljazeera.com, *The U.S. Placed Itself Above International Law*, *available at* http://www.aljazeera.com/cgi-bin/review/article_full_story.asp?service_ ID=10257 (last visited Jan. 5, 2006). Finally, independent human rights organizations have condemned, often harshly, the "hypocrisy" of U.S. detainee policies: "The rule of law, and therefore, ultimately, security, is being undermined, as is any moral credibility the USA claims to have in seeking to advance human rights in the world." Amnesty International, *supra*, at 8.

More dangerously, concern has been expressed that "[i]ndeed, the USA's conduct threatens to legitimize repressive conduct by other governments." *Id.* Arab nations have begun attempting to justify human rights abuses as part of their own fight against terrorism. Egypt's continued use of its 1958 "Emergency Law" is illustrative. Egypt relies on that law to criminalize political dissent at will, and to refer civilian defendants to military courts or to exceptional state security courts in which trials do not meet international standards of fairness. Human Rights Watch 2005 Report at 454. It is estimated that in Egypt the total number of persons detained without charge for prolonged periods numbers around 15,000, including 65 attorneys, some of whom have been held for as long as sixteen years. *Id.* at 455. Saad Eddin Ibrahim, a leading human rights activist in the Middle East, has described how the U.S. precedent has damaging effects on efforts to halt such abuses:

> The [Egyptian] government amplifies everything the US government has done since 9/11, which are clear restrictions of civil liberties. And saying basically, "we told you, Americans who have lectured us in the past, about human rights and civil liberties are doing it themselves when violence occurs. So we don't want to hear anymore about human rights or civil rights, national security is foremost." That is hurting our cause. It is undermining what is so great about America, what made America part of the dreams of many people around the world.

Human Rights First, *A Conversation with Saad Eddin Ibrahim*, May 8, 2003, *available at* http://www.humanrightsfirst.org/middle_east/egypt/ibrahim/hrd_ibr_2.htm (last visited Jan. 5, 2006); *see also* Human Rights Watch, *Human Rights Watch World Report 2003*, at 405, *available at* http://www.hrw.org/ wr2k3/pdf/mideast.pdf (last visited Jan. 5, 2006) ("Local [Middle East] human rights activists and others were concerned that [U.S.] actions conveyed a strong message that basic rights and safeguards could be shelved in times of crisis or emergency, precisely the rationale that governments across the region have long used to justify their own widespread abuses.").

The "war on terror" has been thrust upon the United States at a terrible price, and the need to thwart, defeat, and punish those who conspire to harm the nation and its citizens puts immense pressure on human rights and the rule of law. In balancing these often competing interests, it is important to recognize that respect for human rights and adherence to the rule of law are the very principles that form the core of the United States' efforts to promote democracy in the Middle East, where the United States' continued leadership is essential to the preservation and expansion of the substantial progress that already has been achieved.

CONCLUSION

For the foregoing reasons, the *amicus curiae* respectfully requests that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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